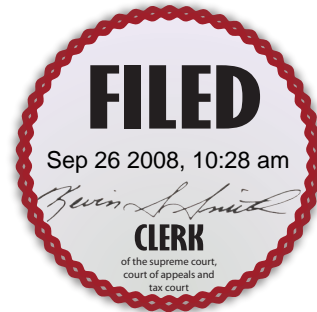


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WALTER ROWLEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0802-CR-184
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause Nos. 49G06-0710-FC-223095
49G06-0703-FA-37244

September 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a bench trial, Appellant-Defendant Walter Rowley was convicted of Stalking as a Class C felony, Stalking as a Class D felony, Battery as a Class B misdemeanor, Intimidation as a Class A misdemeanor, Intimidation as a Class D felony, Domestic Battery as a Class D felony, Domestic Battery as a Class A misdemeanor, Battery as a Class A misdemeanor, Criminal Mischief as a Class B misdemeanor, and Attempted Residential Entry as a Class D felony. On appeal, Rowley contends that the evidence was insufficient to support his conviction in Count VII for Intimidation as a Class D felony.¹ Concluding that the evidence was insufficient, we vacate Rowley's conviction of Class D felony intimidation.

FACTS AND PROCEDURAL HISTORY

Rowley and Nikita Wagner were romantically involved for a period of approximately five years. During the course of their relationship, Wagner gave birth to a daughter, A.R. Rowley and Wagner ended their relationship at some point during 2006. At that time, paternity was established, and Rowley was granted weekend visitation with A.R.

Over a period of approximately six months beginning in May of 2007, Rowley committed a number of violent acts against Wagner. On at least four of those occasions, Wagner reported Rowley's conduct to the police.

On September 27, 2007, Rowley drove past Wagner as she was walking along the street pushing A.R. in a stroller. Rowley stopped and approached Wagner. Rowley immediately began yelling at Wagner. Rowley punched Wagner several times in the head, dislocated her shoulder, and wrestled her to the ground. Rowley then began kicking Wagner

¹ Ind. Code § 35-45-2-1 (2007).

in the head. Rowley told Wagner that if she ever “called the police again he was going to kill her.” Tr. p. 82. Rowley eventually ended his physical assault on Wagner when a passerby intervened. Wagner reported the incident to the police.

On October 24, 2007, as a result of the September 27, 2007 incident and the other violent acts committed against Wagner, the State charged Rowley with twelve offenses, including two counts of stalking, four counts of domestic battery, two counts of battery, two counts of intimidation, criminal mischief, and attempted residential entry. Rowley waived his right to a jury trial and, following a bench trial on January 16, 2008, was convicted of all but two of the domestic battery charges. On January 31, 2008, Rowley was sentenced to a term of eight years, all executed. This appeal follows.

DISCUSSION AND DECISION

On appeal, Rowley contends that the evidence was insufficient to support his conviction for intimidation as a Class D felony.

Initially, we note our standard for reviewing sufficiency claims. When reviewing a claim of insufficient evidence, we do not reweigh the evidence or reassess the credibility of witnesses. Instead, we consider only the evidence most favorable to the verdict and any reasonable inferences to be drawn therefrom. We will affirm the conviction if substantial evidence of probative value supports the conclusion of the trier of fact.

Casey v. State, 676 N.E.2d 1069, 1071-72 (Ind. Ct. App. 1997).

In charging Rowley with intimidation, the State alleged the following:

On or about September 27, 2007, in Marion County, State of Indiana, the following named defendant Walter Rowley, did communicate a threat to Nikita Wagner, another person, said threat being: “I will kill you” and/or to kill Nikita Wagner, with the intent that the other person be placed in fear of retaliation for a prior lawful act, to wit: calling the police to make a report, and further that

said threat was to commit forcible felony, to wit: murder.

Appellant's App. p. 22. Therefore, to support Rowley's conviction for intimidation in this case, the State was required to show that Rowley: 1) communicated a threat; 2) to another person; 3) with the intent that the other person be placed in fear of retaliation for a prior lawful act; 4) by forcible felony. Ind. Code § 35-45-2-1. According to Rowley, the State's allegations and proof were insufficient to show that his threats to Wagner were intended to place her in fear of retaliation for a prior lawful act. Specifically, Rowley claims that the State's proof related to Wagner's future conduct, and not a prior act.

In *Casey*, this court vacated Casey's conviction and sentence for intimidation, concluding that the State had failed to prove that his reason for threatening the victim was to place her in fear of retaliation of a prior lawful act. *Casey*, 676 N.E.2d at 1073. The court found that the language in the information charging Casey with intimidation did not specify the victim's prior lawful act and that the State failed to demonstrate that Casey's statements to the victim that "You're next bitch" and that he was going to kill her were in retaliation for any prior lawful act. *Id.* at 1072-73. In vacating Casey's conviction, the court determined that the language of Indiana Code section 35-45-2-1(a)(2) demonstrated the legislature's intent to require the State to prove that the victim had engaged in a prior lawful act, and that the defendant intended to repay the victim for that act. *Id.* at 1072.

Here, the evidence establishes that on September 27, 2007, Rowley, while punching and kicking Wagner in the face, threatened to kill her if she called the police on him again. The plain language of Rowley's threat, that if she ever "called the police again he was going

to kill her,” suggests to us that Rowley’s threat was intended to convince Wagner to refrain from engaging in a particular act, *i.e.*, calling the police, in the future.² Tr. p. 82. Further, upon review, we find no indication in the record suggesting that Rowley’s threat to Wagner was made in retaliation for Wagner’s prior lawful act of reporting Rowley to the police.

While we certainly do not approve of Rowley’s attack on Wagner, we believe that Rowley’s threat was intended to persuade Wagner to refrain from reporting Rowley to the police in the event of future violent attacks by Rowley, and was not intended to place Wagner in fear of retaliation of any prior lawful act. As such, we conclude that the State has failed to meet its burden of proving that Rowley’s threats placed Wagner in fear of retaliation for a prior lawful act, and as a result, we hereby vacate Rowley’s conviction and sentence for intimidation as a Class D felony.³

Rowley’s conviction and sentence for intimidation as a Class D felony are hereby vacated.

RILEY, J., and BAILEY, J., concur.

² We note that Rowley’s threat appears to fall squarely within the provision of Indiana Code section 35-45-2-1(a)(1), which provides that a person who communicates a threat to another person, with the intent that the other person engage in conduct against the other person’s will, commits intimidation. However, because the State did not charge Rowley under this provision, we cannot affirm his conviction on this ground.

³ Although we reverse Rowley’s conviction for intimidation as a Class D felony, we note that this decision has no impact on his sentence. Rowley was sentenced to three years imprisonment for this intimidation conviction, which was to be served concurrently with his sentence of eight years imprisonment for his Class C felony stalking conviction. Because Rowley does not challenge his stalking conviction, his sentence of eight years stands.